No. 9989

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

HYMAN HOWARD GOODMAN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S BRIEF.

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Jurisdiction.

This appeal is from a judgment of conviction [R. 7-8] entered on December 1, 1941, in the District Court of the United States for the Southern District of California, Central Division, after a trial before Judge Ben Harrison and a jury.

The indictment [R. 2-5] was filed on October 22, 1941. It contained one count and charged the appellant and five others, Kichiro Takizawa, George M. Nakauchi, Kenkichi Takahashi, Elwood L. Keeler and Hiroshi Yamaguchi, with a conspiracy (18 U. S. C. A. §88) to export industrial diamonds from the United States to Japan without a license, in violation of 50 U. S. C. A. §99 and the Presidential Proclamation of July 2, 1941.

The defendants Takizawa, Nakauchi and Takahashi pleaded guilty. The indictment against the defendant Yamaguchi was dismissed upon motion by the Government. The appellant and the defendant Keeler were tried and found guilty. [R. 6-7, 18-19.]

Appellant's notice of appeal was filed on December 3, 1941. [R. 9-12.] The bill of exceptions [R. 18-132] and assignment of errors [R. 133-140] were filed on January 7, 1942, within the time allowed by law, as extended by order of the District Court. [R. 16-17.]

The jurisdiction of the District Court was based on section 24, Judiciary Code (28 U. S. C. A. §41). The jurisdiction of this court is invoked under section 128, Judiciary Code (28 U. S. C. A. §225).

Statement of the Case.

The principal ground urged by the appellant for a reversal herein is that the proof was insufficient to sustain the verdict. We therefore present at the outset a summary of the evidence, chronologically arranged. In consonance with the principle that an appellate court views the evidence in a light most favorable to the appellee, we have analyzed the evidence upon the assumption that all conflicts and questions of fact have been resolved by the jury in favor of the Government. The summary is as follows:

Goodman, the appellant, is a native citizen of the United States who has lived in California since 1919. He was engaged in the import-export business for a number of years. [R. 67, 99.]

The defendant Takahashi is a Japanese who had been travelling between the United States and Japan since

1907, in connection with his business of importing and exporting various articles of merchandise between the two countries. He returned from his last trip to Japan in May, 1941. [R. 34, 38.]

Goodman and Takahashi first met in 1937. Since then they had several business transactions with each other in connection with Takahashi's export business. [R. 35, 99, 106, 109.]

In June, 1941 Takahashi told Goodman that he was going into business here and wanted to purchase a number of articles. He gave Goodman a list of articles which he was going to handle, including industrial diamonds, machinery and old stockings. Takahashi further told Goodman that he had an order from Japan for industrial diamonds and if he were able to fill that order he wanted to purchase them. Goodman answered that Takahashi would be able to purchase the diamonds through him. Takahashi asked Goodman to obtain an export license and Goodman said he would try. They then arranged that Goodman would receive from Takahashi 10% commissions on all purchases of industrial diamonds. [R. 20-22, 25, 34, 37-38.]

Goodman then looked for suppliers of industrial diamonds and found Musto-Keenan Co. listed in the telephone directory. [R. 87, 100.]

Musto-Keenan Co. have been a dealer in industrial diamonds in Los Angeles for a number of years. The defendant Keeler was its secretary-treasurer and the manager of the abrasives department, which included industrial diamonds. Keeler received a weekly salary and 25% of the annual profits realized by the abrasives department. [R. 40-41, 85.]

After a telephone appointment, Goodman went to the office of Musto-Keenan Co. where Keeler and he met for the first time. Goodman told Keeler that he had a customer, Takahashi, for industrial diamonds for whom he was acting as broker. Keeler said that Musto-Keenan Co. would be able to sell the diamonds. Goodman then told Keeler that he would get a commission from Takahashi on the purchases, but that on previous occasions when he had purchased merchandise for Takahashi, the latter had reduced Goodman's commission when he found out the source of supply and refused to pay him the full commissions originally agreed upon. Goodman therefore asked for an extra commission from Musto-Keenan Co. Keeler said that Musto-Keenan Co. did not pay commissions, but that when there was a broker in a deal there could be a differential of about 4 or 5% between the actual selling price and the list price to the customer which would be retained by the broker. [R. 87, 101, 109-110.]

Keeler and Goodman then arranged that on sales to Takahashi two invoices would be issued by Musto-Keenan Co. One invoice would state the list price and the other would state the net price, which was 5% less. The larger invoice would be given to Takahashi, who would pay accordingly, and Musto-Keenan Co. would then refund to Goodman the extra 5% as his commissions. [R. 57-59, 65, 87, 89, 101.]

Goodman then purchased some samples of industrial diamonds for $13.21, for which he paid in cash and delivered them to Takahashi. These samples are in evidence as Exhibit 2. [R. 23, 25.]

Takahashi was dissatisfied with the quality and color of the samples and Takahashi and Goodman therefore

decided to go together to Musto-Keenan Co. About the end of June, 1941 Goodman and Takahashi went to Musto-Keenan Co., where Takahashi and Keeler had a conversation in Goodman's presence. Takahashi told Keeler that he wanted to purchase industrial diamonds. Keeler asked for what purpose Takahashi was going to use them. Takahashi said that he had received an order from Japan for the diamonds but that he knew nothing about diamonds. He was therefore going to trust Keeler entirely. Keeler answered that Takahashi would not have to be afraid of losing money on anything he, Keeler, would handle. [R. 23-24, 101-102.]

As the end of the conversation Takahashi gave an order for some representative samples of diamonds. Keeler ordered the diamonds from New York and delivered them in Los Angeles about July 7, 1941. This was the first sale to Takahashi. [R. 39, 88.]

Between July 7 and October 1, 1941, there were six sales of industrial diamonds by Musto-Keenan Co. which were delivered to Takahashi in Goodman's presence. The volume of these sales was larger than to any other customer of Musto-Keenan Co. [R. 39, 94, 95.]

Following is a summary of these sales, as reflected in the sales book [Exhibits 10 and 11, R. 39]:

Order No.	Date	Sold to	Item	Price	Sale Tax	Total Price
A 1265	6/30/41	Cash	Bortz & 10.95 cts. Diamonds	$ 13.21	$ .40	$ 13.61
A 1267	7/ 7/41	H. H. Goodman	Misc. Bortz	354.16	10.63	364.79
A 1275	7/22/41	"	Bortz	5136.97	154.11	5291.08
A 1280	8/ 1/41	"	Misc. Bortz	1570.00	46.10	1677.10
A 1287	8/11/41	"	"	2210.11	66.30	2276.41
A 1298	9/ 4/41	"	700 cts. lot 11/3's diamonds	3731.00	111.93	3842.93
A 1312	10/ 1/41	"	Misc. Bortz	8115.29	243.46	8358.75

During this period Takahashi saw Keeler in Goodman's presence at Musto-Keenan Co. office about 10 times. He always discussed the quality of the diamonds with Keeler and Goodman. He told them that he had received letters from Japan in which they demanded extra good quality and that, although he was not experienced in diamonds, he did no think the quality of the diamonds was very good. [R. 30-31, 33, 35-37.]

Upon each sale Keeler made out two bills, one stated the list price and the other the net price, which was less 5%. The bill for the list price was given to Takahashi, who did not know about the other bill. Takahashi paid Goodman the list price and Goodman paid the same amount to Keeler in Takahashi's presence. Subsequently Keeler refunded to Goodman the extra 5% and retained for Musto-Keenan Co. only the net price. The total commissions which Goodman received from Musto-Keenan Co. as a result of these refunds was about $800. [R. 25, 33, 37-38, 57-59, 65-66, 89, 103, 104.]

As anticipated by Goodman, although Takahashi originally agreed to pay Goodman a commission of 10% on all purchases, he subsequently reduced the commission to 5%, and made Goodman agree to rebate 2% to him. This left Goodman a net of only 3%. Moreover, Takahashi failed to pay Goodman even this reduced commission and actually paid him a total of only $268.15. Goodman believed that Takahashi had a large yen fund on which he could raise American dollars to purchase industrial diamonds and other things and that the source of some of Takahashi's dollars was the receipt of dollars from people in the United States in exchange for yen in Japan. Takahashi told Goodman "I cannot pay for diamonds

until the ship gets in" and "I will pay you your commissions when the boat arrives". But he never paid more than the $268.15. [R. 25, 38, 66-67, 105, 107-108, 113-114.]

Goodman generally paid Musto-Keenan Co. with his own checks [Exhibits 12, 13 and 14]. Takahashi paid Goodman by cash and checks on California banks. Two of these checks in evidence were made by Takahashi and two others by Takizawa. Takahashi's checks were returned uncollected by the bank and were afterwards made good. [Exhibits 3, 16 and 17; R. 43-44, 48-49, 103.]

Sometime in July and after Takahashi had made one or two purchases, Takizawa came to Keeler, showed him a copy of the list which Keeler had previously given to Goodman and asked Keeler about prices for industrial diamonds. Keeler told Takizawa that other people, including Takahashi, were placing orders for diamonds and asked "Who brought up this list?" But Takizawa did not reply. Keeler then said that if Takizawa was going to purchase together with Takahashi it would be all right and that it would be very dangerous if Takizawa did not purchase the diamonds together with Takahashi. [R. 45-46, 94.]

When Keeler next saw Takahashi and Goodman he told them about Takizawa's visits. Takahashi said that Takizawa was one of his associates. Keeler then said that he would prefer that Takahashi and Takizawa purchased material together and credited Goodman with the sales, so that there would be no friction between the two. [R. 103.]

In August Takizawa met Takahashi, Goodman and Keeler at Musto-Keenan Co.'s office and there was a

conversation about diamonds. Takahashi complained that the quality of the diamonds was not very good. Keeler answered that it was the best for the price. Takahashi then said that there was a big order coming from Japan and he wanted Keeler to be very careful about the quality. Keeler answered that it would be all right. Takahashi placed an order for diamonds for about $15,000, but insisted that Keeler personally go East to select the quality. Keeler agreed to take the trip only after Takahashi put up a deposit of $1000 and promised to take the entire lot when it arrived. [R. 46-47, 89-90.]

Keeler then went to Chicago, selected the diamonds and had them shipped to Musto-Keenan Co.'s bank at Los Angles. Upon Keeler's return he showed the diamonds to Takahashi and Takizawa in Goodman's presence, but only a part of the diamonds were then taken up. [R. 90.]

Keeler was about to leave with his wife for a vacation in Mexico and arranged with Goodman to meet him upon his return, to take up the balance of the diamonds. Keeler afterwards sent Goodman a card from Mexico notifying him of the time of his arrival. Upon Mr. and Mrs. Keeler's return on September 15, Takahashi and Goodman met them at the airport. There were conversations between Keeler, Takahashi and Goodman, and it was arranged that they would meet the following morning to take up the balance of the diamonds. [R. 31, 35, 68, 90-91, 104.]

The following morning Keeler took the diamonds from the vault in the bank and drove with Goodman to the latter's office, where Takahashi, Takizawa and Nakauchi subsequently arrived. After some conversations Takahashi took the balance of the diamonds, paid Goodman

about $8000 and Goodman in turn gave Keeler a check for the same amount. Musto-Keenan Co. did not use this check, but returned it to Goodman a few days later in exchange for Goodman's check for the correct amount, after allowing Goodman 5% commission. [R. 31-32, 47-48, 91, 105.]

This was the last sale of diamonds by Musto-Kennan Co. and the last time when Goodman was in contact with the other defendants.

As stated, the foregoing resumé of the facts and of Goodman's dealings with Takahashi, Keeler and the other defendants is based upon all of the evidence, viewed from a light most favorable to the Government. The only conflict in the testimony was that Goodman and Keeler denied that Takahashi had told them that he was buying the diamonds for export to Japan and that Takahashi had asked Goodman to obtain a license, but under the principle that all facts are deemed to have been found in appellee's favor, it is assumed that the jury accepted Takahashi's testimony and our argument will proceed on that basis.

It was also conceded that none of the defendants named in the indictment had a license to export industrial diamonds from the United States. [R. 19.]

It is not contended and there is no testimony that Goodman had anything to do with the diamonds after they reached Takahashi's hands.

The only evidence with respect to the disposition of the diamonds purchased from Musto-Keenan Co. is as follows:

The sample diamonds purchased by Goodman at his first meeting with Keeler were kept by Takahashi. They are in evidence as Exhibit 2. Takahashi returned some of the other diamonds to Musto-Keenan Co. and received credit, but he testified that he did not send any of them away. [R. 25, 30.]

There is no testimony by Takizawa that he received or disposed of any diamonds.

Nakauchi testified that on one occasion he received diamonds from Takahashi but returned them immediately because the quality was bad. Takahashi told him that he was going to have them exchanged. [R. 51.]

On another occasion Nakauchi received three packages of diamonds from Takahashi or Takizawa and put them on a shelf in his store in Gardena. These three packages were taken from that shelf by Mr. McCormick, the agent of the Federal Bureau of Investigation, and are in evidence as Exhibit 9. [R. 51, 59.]

Despite a motion to strike, the court permitted Nakauchi to testify that Takahashi or Takizawa once gave him a bag or portable photograph and told him that it contained diamonds and that Nakauchi left the package in a hotel room in San Francisco. He had driven to San Francisco with a friend who was returning to Japan. [R. 52-54.]

There was no testimony that Goodman or Keeler were ever told or knew anything about this trip to San Francisco or the conversation between Takizawa and Nakauchi. Furthermore, there was no evidence that the package actually contained diamonds, that Nakauchi's friend actually went to or took diamonds to Japan, or if he did take diamonds, that he had no license to export them.

The defendants made a motion to strike out this testimony about the San Francisco incident, but the motion was denied and an exception taken. [R. 53-54.]

During the argument, the Government referred to this testimony by Nakauchi and told the jury that they had a right to infer that diamonds were taken to San Francisco and that they "went aboard one of the Japanese boats to get over to Japan". Exception was taken to this statement, but the trial court stated that "one of the witnesses anyhow testified that he took this Japanese friend that was going to Japan, took the diamonds to San Francisco, and the last time he saw them was in a hotel room". [R. 116-117.]

At the conclusion of the Government's case and of the entire case the defendants made motions for a directed verdict on the ground that there was not sufficient evidence to warrant sending the case to the jury and that the Government failed to prove the elements of a conspiracy or a violation of the Presidential Proclamation of July 2, 1940. Both motions were denied and exceptions taken. [R. 84-85, 115-116.]

Specification of Errors.

Appellant relies upon the second [R. 133-134], third [R. 134-135], fourth [R. 135-137] and fifth [R. 137-140] assignments of error.

The second and third assignments involve one question—the sufficiency of the evidence—and will be argued together. The fourth and fifth assignments likewise involve one question—admission of testimony—and will be argued together.

Second Assignment of Error.

[R. 133-134.]

"At the end of the Government's case the following took place:

"Mr. Silverstein: The Government rests."

* * * * * * * *

"Mr. Peterson: The Defendant Keeler now moves, at the close of the Government's case in chief, that the Court instruct the jury to return a verdict of not guilty against the Defendant Keeler, as charged in the indictment, on the ground that they have not sufficient evidence to warrant the case going to the jury.

Mr. Cohen: The defendant Goodman interposes the same motion.

The Court: Motion denied.

Mr. Peterson: Exception allowed to each defendant?

The Court: Exception allowed to each defendant."

This motion by the defendant Goodman should have been granted and its denial by the District Court was erroneous for the reason that there was not sufficient evidence to warrant sending the case to the jury or to support a verdict of guilty or to show that the defendant Goodman committed the offense charged against him in the indictment."

Third Assignment of Error.

[R. 134-135.]

"At the conclusion of the testimony the following took place:

"Mr. Cohen: That is our case. Defendant Goodman rests.

Mr. Silverstein: No rebuttal. Government rests.

Mr. Cohen: Defendant Goodman, if Your Honor please, also moves for a directed verdict on the grounds and for the reason that the Government has failed to prove any of the elements constituting the crime of conspiracy or a violation of the Executive order of the President as of the date of July 2, 1940; for that reason, the directed verdict should be given the Defendant Goodman.

The Court: Motion denied; exception noted."

This motion by the defendant Goodman for a directed verdict should have been granted and its denial by the District Court was erroneous for the reason that the Government failed to prove the elements constituting the crime charged in the indictment and the evidence was insufficient to warrant sending the case to the jury."

ARGUMENT.

POINT I.

The Evidence Fails to Show That Any Crime Was Committed. It Shows at Most That Diamonds Were Purchased for the Purpose of Exportation to Japan, but There Is No Evidence (1) That There Was a Conspiracy to Export Them Without a License, (2) That Any of the Diamonds Were Actually Exported, or (3) if They Were Exported —That the Person Who Exported Them Had No License.

This being a conspiracy case it was incumbent upon the Government to prove that there was herein

> "* * * a combination of two or more persons, by concerted action, to accomplish a criminal or unlawful purpose, or some purpose not in itself criminal or unlawful, by criminal or unlawful means."
>
> *Marino v. U. S.,* 9 Cir., 91 F. (2d) 691, 693; 113 A. L. R. 975; cert. den. 302 U. S. 764.

We submit that an analysis of the evidence in the light of the applicable authorities fails to reveal any legal proof of the existence of such a conspiracy.

Section 99, Title 50, U. S. C. A., which is the basis of the charge in this case, was enacted on July 2, 1940. Its pertinent provisions are as follows:

> "Whenever the President determines that it is necessary in the interest of national defense to prohibit or curtail the exportation of any military equipment or munitions, or component parts, thereof, or machinery, tools, or material, or supplies necessary for the manufacture, servicing, or operation thereof, he

may by proclamation prohibit or curtail such exportation, except under such rules and regulations as he shall prescribe."

On the same day the President took the following action under the statute: (1) He issued a Military Order designating Brigadier General Russell L. Maxwell as Administrator of Export Control, and (2) he issued a Presidential Proclamation (No. 2413) providing, among other things as follows:

"Now, Therefore, I, Franklin D. Roosevelt, President of the United States of America, acting under and by virtue of the authority vested in me by the said act of Congress, do hereby proclaim that the administration of the provisions of section 6 of that act is vested in the Administrator of Export Control, who shall administer such provisions under such rules and regulations as I shall from time to time prescribe in the interest of the national defense.

"And I do hereby further proclaim that upon the recommendation of the aforesaid Administrator of Export Control, I have determined that it is necessary in the interest of the national defense that on and after July 5, 1940, the articles and materials hereinafter listed shall not be exported from the United States except when authorized in each case by a license as hereinafter provided: * * *

"i. Industrial diamonds. * * *

"And I do hereby empower the Secretary of State to issue licenses authorizing the exportation of any of the said articles and materials the exportation of

> which is not already subjected to the requirement that a license be obtained from the Secretary of State authorizing their exportation and I do hereby authorize and enjoin him to issue or refuse to issue licenses authorizing the exportation of any of the articles or materials listed above in accordance with the aforesaid rules and regulations or such specific directives as may be, from time to time, communicated to him by the Administrator of Export Control."

Although the statute authorized the President to "prohibit or curtail" exportation, he did not completely prohibit the exportation of industrial diamonds but merely prohibited such exportation *without a license.*

On March 15, 1941, the President issued an executive order, effective April 15, 1941, prescribing additional regulations governing the exportation of articles enumerated in the Proclamation of July 2, 1940. Among these regulations is the following:

> "8. The original license must be presented, prior to exportation, to the collector of customs at the port through which the shipment authorized to be exported is being made. If shipment is made by parcel post, the license must be presented to the postmaster at the post office at which the parcel is mailed."

The Administrator of Export Control at the same time issued the following "Information Regarding the Exportation of Articles and Material Subject to License" (pp. 25-32 of "Export Control Regulations and Export

Control Schedule No. 1" published by the Administrator of Export Control, effective April 15, 1941):

"4. WHO MAY APPLY.

a. Applications may be made by a corporation, partnership, individual, or their duly authorized agent, who is in fact the exporter of the goods, except when the proposed shipment consists of unusued metal working machinery, in which case applications must be made by the manufacturer * * *

"5. WHEN TO APPLY,

a. Applications may be made at any time prior to the clearing of the goods through the port of exit."

It thus appears that there was no requirement that a person who purchased industrial diamonds for exportation purposes had to obtain a license. A license was only necessary "prior to exportation" and had to be obtained by the person "who is in fact the exporter of the goods" and "at any time prior to the clearing of the goods through the port of exit".

Due to the recent origin of the statute and Proclamation we have not found any reported judicial decision defining the quantum of proof necessary in prosecutions for their violation. However, the Proclamation closely parallels the law which prohibits the importation of goods without payment of customs duties. In both cases the acts of exportation and importation are not prohibited absolutely, but only conditionally, *i. e.*, exportation without a license and importation without declaration and payment of duties. The law thus recognizes both lawful and unlawful exportations and importations.

There have been many decisions defining the proof necessary for conviction in smuggling cases. Some of these are collected in 25 C. J. Secundum, recently published, at page 399, in support of the following rule:

> "* * * and the government has the burden of showing that the merchandise was imported into the country from without and that it was unlawfully imported."

In *Kennedy v. U. S.*, 44 F. (2d) 131, 133, a smuggling case, this court said:

> "The burden of unlawful importation is on the government."

In *Shillitani v. U. S.*, 2 Cir., 279 F. 393, a case involving a conspiracy to smuggle, the court reversed a conviction although there was no question that the defendant knew that the goods had been imported from abroad, and said (p. 395):

> "There was no evidence whatever to sustain either of the counts of the indictment, no showing that the goods had been introduced into the United States contrary to law, and consequently no showing that the defendant had any knowledge of unlawful importation or failure to pay duty."

By a parity of reasoning, it must follow that it is necessary for the Government in a case of this type to furnish proof not only that there was a combination to export the diamonds, but also that Goodman participated in a conspiracy to export them unlawfully or without obtaining a license "prior to exportation".

Is there any proof, direct or circumstantial, that anyone involved in this case violated or conspired to violate the above license regulations?

All that the evidence shows is that Takahashi and Takizawa were purchasing and Keeler and Goodman were selling industrial diamonds intended for export to Japan and that they had no export licenses. But that is as far as the evidence goes.

The most vital link in the chain of incriminating evidence—that the diamonds were to be exported or were actually exported *without a license*—is missing.

It is true that Takahashi, Takizawa and Nakauchi pleaded guilty, but their admissions of guilt can, of course, in no way affect Goodman, whose

> "* * * guilt and sentence are not to be determined by the court's or jury's estimate, false or sound, of a confederate's character or by the extent of a conspirator's guilty participation in the substantive offense."
>
> *U. S. v. Mann,* 7 Cir., 108 F. (2d) 354, 356.

In the court below the Government argued [R. 116-118] that the jury could infer from the following items of evidence that the diamonds were actually exported to Japan: (a) The testimony by Nakauchi about his trip to San Francisco, and (b) the testimony by Takahashi about the letters that he received from Japan. We anticipate that the Government will similarly rely upon that evidence to sustain its position before this court and therefore will analyze both items closely.

(a) Nakauchi's Testimony About the San Francisco Trip.

Nakauchi's testimony was as follows [R. 52-55]:

"Q. Other than that, have you ever received any other diamonds? A. Yes, once.

Q. From whom? A. I think either Mr. Takahashi or Mr. Takizawa.

Q. And when was that? A. The end of July, I think.

* * * * * * * *

Q. What did you do with them? A. I at one time had in my hand a bag or something that contained diamonds.

Q. What did you do with them after you received them? A. I left them in a certain room in a hotel in San Francisco.

Q. You did that yourself? A. Yes.

The Court: Who gave you the diamonds?

The Witness: I think I received them from Mr. Takizawa.

The Court: Did you take them to San Francisco?

The Witness: My friend was returning to Japan and I chauffeured him up there.

By Mr. Silverstein:

Q. You chauffeured somebody that was going back to Japan? A. Yes.

Q. You drove somebody up north, is that it? A. Yes.

The Court: You took the diamonds with you?

The Witness: I do not know whether I had the diamonds or not, but I understood—I heard that the diamonds were in that bag.

Mr. Peterson: That, of course, ought to be stricken.

The Court: Just a moment, I will find out. What bag?

The Witness: A portable phonograph.

The Court: Who told you there were diamonds in there?

The Witness: Mr. Takizawa.

The Court: Is that one of the defendants in this case?

The Witness: The man that testified here before me.

Mr. Peterson: I now move to strike the testimony relative to the San Francisco episode upon the grounds that it has nothing to do with any of the issues in this case, entirely outside of the scope of this indictment; it is hearsay as against the defendant whom I represent.

The Court: It is a statement by a co-defendant. He said the satchel or bag contained industrial diamonds, and he took them to San Francisco.

Mr. Peterson: My recollection of his testimony is that he was told that they contained it.

The Court: He said one of the defendants told him. That would be binding, if there is a conspiracy.

Mr. Peterson: If it was within the scope of the indictment:

The Court: Objection overruled.

Mr. Peterson: Note an exception. May it be understood that if one of us makes an objection, it may be deemed by the other counsel."

Assuming that this evidence be deemed properly admissible and binding on Goodman (which we question and will presently discuss), it is entirely innocuous and does not give rise to any inference that there was a conspiracy to export the diamonds unlawfully or that the diamonds were actually exported without a license.

All we are told is that Takizawa gave Nakauchi a package in which, according to what Takizawa told him, there were industrial diamonds and that Nakauchi left it in a hotel room in San Francisco. We are also told that on his trip to San Francisco Nakauchi drove up a friend who was returning to Japan.

Firstly, there is no evidence showing any connection between the friend in the automobile and the package in the hotel room. But even if, by a stretch of the imagination, the jury could have arrived at the conclusion that there was such a connection between Nakauchi's friend and the package in the hotel room, there is no evidence whatsoever (1) about the identity of the friend; (2) that this friend ever went to Japan; (3) that he ever took the package to Japan; (4) that he had no license to export diamonds, if he did actually export them.

For aught that we know—and it must be presumed—this friend, who would be "in fact the exporter" if he took the diamonds to Japan, had a license "prior to the clearing", as required by the rules 4 and 5, quoted on page 17, *supra*.

It would therefore be pure conjecture to say that Nakauchi's testimony proves that the diamonds were at all exported or were exported without a license. Conjecture is not evidence.

A great deal has been written about circumstantial evidence and the extent to which inferences may be drawn from evidentiary facts. But the best guide is still the one laid down many years ago by the Supreme Court in *U. S. v. Ross,* 92 U. S. 281, 284, that:

> "The law requires an open, visible connection between the principal and evidentiary facts and the deductions from them, and does not permit a decision to be made on remote inferences."

Another principle frequently quoted and applied is that set forth in *Dahly v. U. S.*, 8 Cir., 40 F. (2d) 37, 43, as follows:

> "Circumstantial evidence is equally available with direct evidence to prove the conspiracy, but suspicion or conjecture cannot take the place of evidence. Guilt must be established beyond a reasonable doubt, and, where the evidence is as consistent with innocence as with guilt, no conviction can properly be had."

This court has expressed the same idea in *Kennedy v. U. S.,* 44 F. (2d) 131, as follows:

> "Circumstantial evidence, of itself, is sufficient to convict if the circumstances are consistent with each other, consistent with the guilt of the party charged, inconsistent with his innocence and inconsistent with every other reasonable hypothesis except that of guilt."

The entire subject was summed up tersely in *Brown v. U. S.*, 1 Cir., 16 F. (2d) 682, 685, as

> "In a criminal case, where the liberty of a citizen is at stake, the jury should not rest its verdict upon conjecture or suspicion."

When examined with these principles in mind, Nakauchi's testimony contains no fact from which the jury could properly infer the existence of a conspiracy that the diamonds would be exported or that they actually were exported without a license.

Moreover, this testimony by Nakauchi may not even be considered in determining Goodman's guilt.

There being no other or independent testimony that a conspiracy existed and that Goodman was a party to it, then this evidence by Nakauchi about his conversation with Takizawa and his trip to San Francisco, of which Goodman had no knowledge, was not admissible or binding upon Goodman.

As was said in *Mayola v. U. S.*, 9 Cir., 71 F. (2d) 65, 67:

> "Before the declarations of co-conspirators can be received in evidence against one charged with participating in the conspiracy, it must be shown by independent evidence that the conspiracy existed and that the accused was a party to it at the time the declarations were made."

Being thus pure hearsay, this evidence is of no value under the well-settled rule that:

> "Reviewing court, in considering sufficiency of proof, should eliminate hearsay evidence."
>
> *Oras v. U. S.*, 9 Cir., 67 F. (2d) 463 (syllabus, p. 464).

To the same effect is *Tofanelli v. U. S.*, 9 Cir., 28 F. (2d) 581.

A similar situation arose in *Bartkus v. U. S.*, 7 Cir., 21 F. (2d) 425. It was there charged that the defendants named Bartkus, Kelps, Nevar and Dronsuth, had conspired to conceal a bankrupt's property. The defendants were convicted and on appeal challenged the sufficiency of the evidence. There was evidence that Bartkus, together "with others" (who were not identified), took away property belonging to the bankrupt. In reversing, the court said (p. 428):

> "But the evidence shows that Kelps, Nevar and Dronsuth were not 'the others' with Bartkus. No one of them was present or was known to have had any knowledge of it. As evidence that they conspired to do this particular thing, it has no probative force whatever. We are not now concerned with the question whether, if a conspiracy were proved, they would be bound by Bartkus' acts. If a conspiracy to conceal had otherwise been established, the act of Bartkus would be the act of all the conspirators. But the act of Bartkus, even if done in pursuance of a plan formed by him, if done without the participation and knowledge of Kelps, Neva and Dronsuth, do not tend to show that they participated in his plan.
>
> The facts proved may warrant the conclusion that Bartkus planned to conceal the bankrupt's property as alleged, but they are not sufficient to support a verdict that Kelps, Nevar and Dronsuth participated with him in such plan. The verdict and judgments against Kelps, Nevar and Dronsuth cannot stand; * * *"

(b) Takahashi's Testimony About the Letters From Japan.

This testimony is of even less probative force than Nakauchi's testimony about the San Francisco incident. This testimony given during direct examination is as follows [R. 30-31]:

> "Q. Did you ever have a conversation with Mr. Keeler about hearing from anyone in Japan regarding diamonds that had been sent? A. No, I did not.
>
> The Witness: I discussed with Keeler the quality of the diamonds and told him I didn't think the quality of the first sample was very good. I spoke occasionally about the quality and that the price was very high.
>
> Q. Did you say anything to him about anyone advising you as to the quality or the price? A. I told him that I had received letters quite a bit from Japan in which they referred quite a lot to the quality; I told him that.
>
> Q. What did you tell him about those letters that you had received concerning the quality? A. The demand that was made by Japan was that they wanted extra good quality; and I told him, not being experienced, even though not being experienced in diamonds, I didn't think the quality was very good.
>
> Q. Was anyone else present when you told Mr. Keeler that? A. Mr. Goodman was there, and Mr. Takizawa was there at times."

And during cross-examination [R. 35-36]:

"Q. Now, then, you mentioned some letters from Japan. What letters did you get from Japan? A. I got all kinds of letters from Japan.

Q. Did you get any letters from Japan on industrial diamonds? A. Yes.

Q. When? How long ago? A. Also in July and August.

Q. They were written in Japanese to you, I suppose? A. Yes.

Q. You didn't show anything like that to Mr. Goodman, did you? A. No, I did not.

The Court: Did you tell him the contents of the letters?

The Witness: Yes.

The Court: What did you tell him?

By Mr. Cohen:

Q. What did you tell him about that? A. I told him that they referred to the quality."

As stated, the Government argued that from this testimony the jury could infer that some of the diamonds reached Japan. [R. 117-118.] How such an inference can possibly be drawn is beyond comprehension.

The witness testified directly that all he told Keeler and Goodman was that he had received letters in which Japan wanted good quality diamonds, but that he did not tell them that he had heard from anyone in Japan regarding diamonds that had been sent. Takahashi spoke all

along about getting good quality and rejected some of the diamonds offered by Keeler because he did not like them. What connection is there between a mere demand for good quality, whether made by Takahashi's customer in Japan through the mail or by Takahashi orally, and the conclusion that Japan had already received some diamonds?

Furthermore, even if it be inferred from these letters that some diamonds had been exported, where is the inference that they were exported by any of the defendants, who were without licenses, in face of the testimony that they did not export any diamonds? In what manner do the letters prove that there was an unlawful exportation?

It follows that Nakauchi's testimony about the San Francisco incident and Takahashi's testimony about the letters from Japan furnish no incriminating proof against Goodman. The situation still remains the same, *i. e.,* that the chain of evidence shows only that the diamonds were intended for Japan, but the most important link—that they were to be exported or were exported *without a license*—is still missing.

As a matter of fact the case seems to have been tried, at least on the part of the Government, with the idea that Goodman was a criminal if he merely helped the Japanese to purchase diamonds for export purposes and without an attempt to show that the crime depended upon exportation without a license. This is evident from the following

statement made during the course of the Government's closing argument to the jury [R. 116]:

> "Mr. Silverstein: Now let me say to you, this is a conspiracy charge, and if these defendants, or either of them, knew that the Japanese were purchasing these diamonds for export purposes, and they aided and abetted, they are guilty under the law knowledge of the conspiracy, if we show that beyond a reasonable doubt, because they don't have to take active part; if they do anything in furtherance of the object of that conspiracy, with knowledge of it, under the law they are a party to it, they are a partnership, they are an agent for one another; * * *"

The Government thus asked for a conviction based upon the fact that the defendants on trial (Goodman and Keeler) "knew that the Japanese were purchasing these diamonds for export purposes". According to the Government, it was immaterial whether Goodman knew that the exportation would be without a license.

We submit that that was exactly what the jury did or could have done, *i. e.*, Goodman was convicted as a conspirator solely because he sold diamonds intended for exportation purposes.

Thus the Presidential Proclamation which merely imposed the requirement of a license "prior to exportation", has in this case been virtually interpreted as an absolute prohibition of exportation, with the result that Goodman, a legitimate merchant, stands convicted for having sold a legitimate article for legitimate export purposes.

POINT II.

Goodman's Acts in Supplying the Diamonds, Being of Themselves Lawful, Did Not Become Criminal Even if Any of the Other Defendants Thereafter Unlawfully Exported the Diamonds Without a License.

So far in our argument we dealt with the question whether there was any evidence, binding upon Goodman, that any of the defendants either intended to export or actually did export the diamonds without a license. We now come to the other questions, which are of equal importance.

Let us assume, *arguendo,* that the Government can point to some evidence from which it might be inferred that Takahashi or another of the Japanese defendants did export the diamonds without a license. The evidence shows, nevertheless, that Goodman confined himself to the selling of the diamonds to Takahashi and that he had nothing to do with them after they reached Takahashi's hands. As far as the evidence goes, Goodman knew that the diamonds were intended for exportation, but there is not a scintilla of proof that he knew that there would be no license when they were exported. The conviction cannot be upheld without such proof.

As was said by this court in *Marino v. U. S., supra,* 91 F. (2d) 691, 696:

> "* * * he must know the purpose of the conspiracy, however, otherwise he is not guilty."

Going a step further we contend that Goodman was not guilty even if he did know that Takahashi was purchasing the diamonds with the intention of exporting them unlawfully.

We submit that in *U. S. v. Falcone,* 311 U. S. 205, affirming 109 F. (2d) 579, the law was settled that one who supplies legitimate articles with knowledge that the purchaser intends to use them for criminal purposes does not thereby become a co-conspirator with the purchaser.

At one time this question gave rise to considerable difference of opinion in the federal courts throughout the country. In *Pattis v. U. S.*, 9 Cir., 17 F. (2d) 562, this court affirmed the rule that a supplier of legitimate materials is guilty if he had notice of the future criminal destination of the materials. This rule was followed in the majority of the circuits. On the other hand, it was held in *Young v. U. S.*, 5 Cir., 48 F. (2d) 26, that a mere sale with knowledge of criminal destination, without actual participation in the criminal activities, does not make one a criminal.

The question was finally settled in *U. S. v. Falcone, supra,* 2 Cir., 109 F. (2d) 579, affirmed 311 U. S. 205. In that case a number of defendants were convicted of a widespread conspiracy to operate illicit stills. Four of the defendants were convicted for having sold or helped to sell to the distillers sugar, yeast, and cans, out of which the alcohol was distilled, or in which it was sold. On appeal these defendants challenged the sufficiency of the evidence. The Circuit Court fully discussed the evidence and stated that it would be assumed that these defendants knew the eventual destination of the goods which they supplied. In reversing the convictions of these fours defendants the court said (p. 581):

> "In the light of all this, it is apparent that the first question is whether the seller of goods, in themselves innocent, becomes a conspirator with—or, what is in substance the same thing, an abettor of—

> the buyer because he knows that the buyer means to use the goods to commit a crime."

The court then reviewed the divergence of opinion in the various circuits about the answer to that question and came to the conclusion that it would follow the view expressed in the *Young* case, *supra,* 47 F. (2d) 26, that the supplier and his helpers are not guilty under such circumstances. The court then continued (p. 581):

> "It is not enough that he does not forego a normally lawful activity, of the fruits of which he knows that others will make an unlawful use; he must in some sense promote their venture himself, make it his own, have a stake in its outcome. The distinction is especially important today when so many prosecutors seek to sweep within the drag-net of conspiracy all those who have been associated in any degree whatever with the main offenders. That there are opportunities of great oppression in such a doctrine is very plain, and it is only by circumscribing the scope of such all comprehensive indictments that they can be avoided. We may agree that morally the defendants at bar should have refused to sell to illicit distillers; but, both morally and legally, to do so was *toto coelo* different from joining with them in running the stills."

In order to resolve the conflict of the decisions, the Supreme Court granted certiorari (310 U. S. 620) and, after hearing argument on this question, unanimously affirmed the decision of the Circuit Court in an opinion by Mr. Justice, now Chief Justice, Stone. (311 U. S. 205.)

The opinion of the Supreme Court is copied in full in Appendix I.

With the principle now settled that a supplier's mere knowledge of criminal destination does not make him a criminal, it must necessarily follow that Goodman's conviction cannot be upheld regardless whether he did or did not have knowledge that the diamonds would eventually be exported without a license.

Summary of Fourth and Fifth Assignments of Error.
[R. 135-150; Appendix II of This Brief.]

THE COURT ERRED IN THE DENIAL OF THE MOTION TO STRIKE OUT THE TESTIMONY BY THE DEFENDANT NAKAUCHI THAT THE DEFENDANT TAKIZAWA HAD TOLD HIM THAT THERE WERE DIAMONDS IN A PACKAGE WHICH HE TOOK TO SAN FRANCISCO. THE REFERENCE TO THAT TESTIMONY DURING THE GOVERNMENT'S CLOSING ARGUMENT, BOTH BY THE TRIAL COURT AND THE UNITED STATES ATTORNEY, ACCENTUATED THE ERROR AND CAUSED SUBSTANTIAL HARM TO THE APPELLANT.

This evidence and the objections and colloquy regarding it were fully copied on pages 20-21 of this brief. On pages 24-25 we also set forth our argument and supporting authorities against its admissibility and there is no need of repetition.

It has also been mentioned that during the Government's closing argument the United States Attorney referred to this testimony of Nakauchi and told the jury that it could be inferred from it that the diamonds had been taken to San Francisco and thus on a boat to Japan;

that there was an exception taken to this argument; and that the court then summarized and emphasized the testimony of the jury. [R. 116-117.]

It is therefore obvious that this evidence was highly damaging and substantially contributed to the adverse verdict, for the Government relied upon it as one of the props of its case.

In the recent cases of *McCandles v. U. S.*, 298 U. S. 342, and *Lynch v. Oregon Lumber Co.*, 9 Cir., 108 F. (2d) 283, it was held that when error is shown by an appellant there should be a reversal, unless it affirmatively appears from the whole record that it was not prejudicial. Under this principle it must be presumed that the erroneous admission of Nakauchi's testimony and the denial of the motion to strike it call for a reversal.

Moreover, admission of hearsay evidence in conspiracy cases has generally been held to be reversible error, especially when, as in this case, it is a principal factor in proving the Government's case. Thus in *Oras v. U. S.*, 9 Cir., 67 Fed. (2d) 462, and *Poole v. U. S.*, 9 Cir., 97 Fed. (2d) 423, both conspiracy cases, this court reversed the convictions because hearsay testimony was erroneously admitted against the defendants.

This verdict being based upon hearsay evidence therefore violates a basic right of an accused under our system of free government—the right to be confronted by the accusing witnesses and not to be convicted by the testimony of a witness as to what he heard from someone else who was not then under oath nor subject to cross-examination.

Conclusion.

Appellant's plea for a reversal and a dismissal of the charge against him is being submitted to this court at a time when our country is going through trying experiences. The ghastly and murderous "stab in the back" of December 7, 1941, has revealed the true and treacherous make-up of the numerous Japanese nationals who for many years carried on their nefarious activities in this fair land under the guise of friendly trading.

It is for that reason that the stigma of a conviction for having intentionally helped traitors in the violation of our defensive laws weighs more heavily on the appellant than the imprisonment and fine which have been imposed.

Looking at the situation in retrospect—as one should in judging appellant's action in the summer and early fall of 1941—we find that appellant's sales to Takahashi were only a small item in the vast amount of material, including iron, steel and oil, then sold by Americans to Japan—with the approval of the Government—under the mistaken expectation that war would thereby be avoided. Events have now taught us that it might have been wiser to have withheld these vast resources from the enemy and to have then risked an armed conflict. But this is at best only hindsight and does not stamp appellant's past dealings as criminal at that time.

Looking at the situation from the judicial standpoint—by transposing oneself into the period before December 7

when the acts took place—one fails to find any evidence that appellant was a criminal.

We therefore beseech this court to reaffirm in this case the basic right so dear to us—in contrast with the tyranny of the dictators—that an accused is innocent until by legally sufficient evidence he is proved guilty beyond a reasonable doubt.

Respectfully submitted,

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Of Counsel.

APPENDIX I.

United States v. Falcone, 311 U. S. 205.

Mr. Justice Stone delivered the opinion of the Court.

The question presented by this record is whether one who sells materials with knowledge that they are intended for use or will be used in the production of illicit distilled spirits may be convicted as a co-conspirator with a distiller who conspired with others to distill the spirits in violation of the revenue laws.

Respondents were indicted with sixty-three others in the northern district of New York for conspiring to violate the revenue laws by the operation of twenty-two illicit stills in the vicinity of Utica, New York. The case was submitted to the jury as to twenty-four defendants, of whom the five respondents and sixteen operators of stills were convicted. The Court of Appeals for the Second Circuit reversed the conviction of the five respondents on the ground that as there was no evidence that respondents were themselves conspirators, the sale by them of materials, knowing that they would be used by others in illicit distilling, was not sufficient to establish that respondents were guilty of the conspiracy charged. 109 F. 2d 579. We granted certiorari, 310 U. S. 620, to resolve an asserted conflict of the decision below with those of courts of appeals in other circuits. *Simpson v. United States,* 11 F. 2d 591; *Pattis v. United States,* 17 F. 2d 562; *Borgia v. United States,* 78 F. 2d 550; *Marino v. United States,* 91 F. 2d 691; see *Backun v. United States,* 112 F. 2d 635. Compare *Young v. United States,* 48 F. 2d 26.

All of respondents were jobbers or distributors who, during the period in question, sold sugar, yeast or cans,

some of which found their way into the possession and use of some of the distiller defendants. The indictment while charging generally that all the defendants were parties to the conspiracy did not allege specifically that any of respondents had knowledge of the conspiracy but it did allege that respondents Alberico and Nole brothers sold the materials mentioned knowing that they were to be used in illicit distilling. The court of appeals, reviewing the evidence thought, in the case of some of the respondents, that the jury might take it that they were knowingly supplying the distillers. As to Nicholas Nole, whose case it considered most doubtful, it thought that his equivocal conduct "was as likely to have come from a belief that it was a crime to sell the yeast and the cans to distillers as from being in fact any further involved in their business." But it assumed for purposes of decision that all furnished supplies which they knew ultimately reached and were used by some of the distillers. Upon this assumption it said, "In the light of all this, it is apparent that the first question is whether the seller of goods, in themselves innocent, becomes a conspirator with—or, what is in substance the same thing, an abettor of—the buyer because he knows that the buyer means to use the goods to commit a crime." And it concluded that merely because respondent did not forego a "normally lawful activity of the fruits of which he knew that others were making unlawful use" he is not guilty of a conspiracy.

The Government does not argue here the point which seems to be implicit in the question raised by its petition for certiorari, that conviction of conspiracy can rest on proof alone of knowingly supplying an illicit distiller, who is not conspiring with others. In such a case, as the

Government concedes, the act of supplying or some other proof must import an agreement or concert of action between buyer and seller, which admittedly is not present here. Cf. *Gebardi v. United States,* 287 U. S. 112, 121; *Di Vonaventura v. United States,* 15 F. 2d 494. But the Government does contend that one who with knowledge of a conspiracy to distill illicit spirits sells materials to a conspirator knowing that they will be used in the distilling, is himself guilty of the conspiracy. It is said that he is, either because his knowledge combined with his action makes him a participant in the agreement which is the conspiracy, or what is the same thing he is a principal in the conspiracy as an aider or abettor by virtue of 332 of the Criminal Code, 18 U. S. C. §550, which provides: "Whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces or procures its commission, is a principal."

The argument, the merits of which we do not consider, overlooks the fact that the opinion below proceeded on the assumption that the evidence showed only that respondents or some of them knew that the materials sold would be used in the distillation of illicit spirits, and fell short of showing respondents' participation in the conspiracy or that they knew of it. We did not bring the case here to review the evidence, but we are satisfied that the evidence on which the Government relies does not do more than show knowledge by respondents that the materials would be used for illicit distilling if it does as much in the case of some. In the case of Alberico, as in the case of Nicholas Nole, the jury could have found that he knew that one of their customers who is an un-

convicted defendant was using the purchased material in illicit distilling. But it could not be inferred from that or from the casual and unexplained meetings of some of respondents with others who were convicted as conspirators that respondents knew of the conspiracy. The evidence respecting the volume of sales to any known to be distillers is too vague and inconclusive to support a jury finding that respondents knew of a conspiracy from the size of the purchases even though we were to assume what we do not decide that the knowledge would make them conspirators or aiders or abettors of the conspiracy. Respondents are not charged with aiding and abetting illicit distilling, and they cannot be brought within the sweep of the Government's conspiracy dragnet if they had no knowledge that there was a conspiracy.

The gist of the offense of conspiracy as defined by 37 of the Criminal Code, 18 U. S. C. §88, is agreement among the conspirators to commit an offense attended by an act of one or more of the conspirators to effect the object of the conspiracy. *Pettibone v. United States,* 148 U. S. 197; *Marino v. United States, supra; Troutman v. United States,* 100 F. 2d 628; *Beland v. United States,* 100 F. 2d 289; cf. *Gebardi v. United States, supra.* Those having no knowledge of the conspiracy are not conspirators, *United States v. Hirsch,* 100 U. S. 33, 34; *Weniger v. United States,* 47 F. 2d 692, 693; and one who without more furnishes supplies to an illicit distiller is not guilty of conspiracy even though his sale may have furthered the object of a conspiracy to which the distiller was a party but of which the supplier had no knowledge. On this record we have no occasion to decide any other question.

Affirmed.

APPENDIX II.

Fourth Assignment of Error.

[R. 135-137.]

During the examination of the witness Nakauchi for the Government the following took place:

"Examination by Mr. Silverstein:

Q. Other than that, have you ever received any other diamonds? A. Yes, once.

Q. From whom? A. I think either Mr. Takahashi or Mr. Takizawa.

Q. And when was that? A. The end of July, I think.

* * * * * * * * *

Q. What did you do with them? A. I at one time had in my hand a bag or something that contained diamonds.

Q. What did you do with them after you received them? A. I left them in a certain room in a hotel in San Francisco.

Q. You did that yourself? A. Yes.

The Court: Who gave you the diamonds?

The Witness: I think I received them from Mr. Takizawa.

The Court: Did you take them to San Francisco?

The Witness: My friend was returning to Japan and I chauffeured him up there.

By Mr. Silverstein:

Q. You chauffeured somebody that was going back to Japan? A. Yes.

Q. You drove somebody up north, is that it? A. Yes.

The Court: You took the diamonds with you?

The Witness: I do not know whether I had the diamonds or not, but I understood—I heard that the diamonds were in that bag.

Mr. Peterson: That, of course, ought to be stricken.

The Court: Just a moment. I will find out. What bag?

The Witness: A portable phonograph.

The Court: Who told you there were diamonds in there?

The Witness: Mr. Takizawa.

The Court: Is that one of the defendants in this case?

The Witness: The man that testified here before me.

Mr. Peterson: I now move to strike the testimony relative to the San Francisco episode upon the grounds that it has nothing to do with any of the issues in this case, entirely outside of the scope of this indictment; it is hearsay as against the defendant whom I represent.

The Court: It is a statement by a co-defendant. He said the satchel or bag contained industrial diamonds, and he took them to San Francisco.

Mr. Peterson: My recollection of his testimony is that he was told that they contained it.

The Court: He said one of the defendants told him. That would be binding, if there is a conspiracy.

Mr. Peterson: If it was within the scope of the indictment.

The Court: Objection overruled.

Mr. Peterson: Note an exception. May it be understood that if one of us makes an objection, it may be deemed by the other counsel."

The admission of the testimony of the witness Nakauchi, herein quoted, as to the facts that the bag or portable phonograph contained diamonds and that the defendant Takizawa told him that there were diamonds in the bag, and the refusal to strike the testimony were erroneous for the reason that the testimony was hearsay and inadmissible.

Fifth Assignment of Error.

[R. 137-140.]

During the closing argument on behalf of the Government the following took place:

"Now let me say to you, this is a conspiracy charge, and if these defendants, or either of them, knew that the Japanese were purchasing these diamonds for export purposes, and they aided and abetted, they are guilty under the law with knowledge of the conspiracy, if we show that beyond a reasonable doubt, because they don't have to take active part; if they do anything in furtherance of the object of that conspiracy, with knowledge of it, under the law they are a party to it, they are a partnership, they are an agent for one another; and if these Japanese took these diamonds, and there is evidence before you that Takizawa went up to San Francisco in an automobile with another Japanese who was leaving for Japan—I don't know whether those diamonds went aboard the boat; I say that you have a right to infer that they did; that they went aboard one of the Japanese boats to

get over to Japan—I say the evidence would give you the right to infer, after considering all of the evidence together, that that is just what took place, and that is what would have taken place on the other diamonds if they could have gotten away with it because there are ways that you know of to smuggle out of the United States.

Mr. Peterson: I want to take an exception to Mr. Silverstein's statement that the Japanese was going to San Francisco and then to Japan.

Mr. Silverstein: I didn't say that. I say there was a Japanese that was going to Japan.

The Court: The Court recalls testimony where Takizawa—I think that is the way you pronounce it—went to San Francisco with another Japanese who was leaving for Japan; and one of the witnesses anyhow testified that he took this Japanese friend that was going to Japan, took the diamonds to San Francisco, and the last time he saw them was in a hotel room.

Mr. Silverstein: That was Nakauchi, not Takizawa; I was wrong about the name.

So, therefore, some of the diamonds undoubtedly reached over there because letters came back to Takahashi concerning the quality, and you have a right, I believe, to infer that, from the facts we have shown you here, that logically, reasonably and honestly, and in all fairness to the defendant, you should conclude that they did reach there because of what came back and the conversations that Takahashi had with these defendants concerning the quality of the diamonds."

The statement by Mr. Silverstein that Takizawa went to San Francisco with another Japanese who was leaving for Japan and the statement by the Court that there was testimony that Takizawa went to San Francisco with another Japanese who was leaving for Japan and that there was testimony by one of the witnesses that he took this friend that was going to Japan, took the diamonds to San Francisco, and the last time he saw them was in a hotel room, were erroneous for the reasons that there was no admissible testimony as to such facts and that the only testimony in the record upon which such statements could be based was the testimony by Nakauchi, which is quoted in the 4th error of these assignments, and which testimony was inadmissible and should have been stricken.